APR 15 1997
OFFICE OF THE CLERK

No. 96-1240

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL LEAHY, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
MARDELL NEREIM *
Assistant Corporation Counsel
30 North LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-6975
Attorneys for Respondent
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a municipality with over 12,000 police officers has violated the Fair Labor Standards Act by failing to treat all meal periods of all police officers as working time, when it has agreed in a collective bargaining agreement governing police officers' employment to compensate them at overtime rates whenever they work in excess of eight hours in a day for any reason, including a missed meal period.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT	1
ARGUMENT	5
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Alexander v. City of Chicago, 994 F.2d 333 (7th Cir. 1993) 2, 8, 14, 15
Arizona v. California, 460 U.S. 605 (1983) 14, 15-16
Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981) 5, 12
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6, 14
Lamon v. City of Shawnee, 972 F.2d 1145 (10th Cir. 1992), cert. denied, 507 U.S. 972 (1993) 5, 11, 12, 13
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 9
Tennessee Coal, Iron & Railway Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944) 7, 9, 10, 11

Statutes and Rules:

29 U.S.C. § 207(k) 1
Fed. R. Civ. P. 56(e) 6, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1240

DANIEL LEAHY, *et al.*,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. A-1 to A-13) is reported at 96 F.3d 228. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. B-1 to B-20) is unreported.

STATEMENT

The Chicago Police Department employs approximately 12,000 sworn officers. See Pet. App. at A-6. Petitioners in these cases, more than 7,600 Chicago police officers, claim that their one-half hour meal period is working time for which they are entitled to pay under section 7(k) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(k). Under section 7(k), the City must pay

overtime only when, during a 28-day period, police officers have "tours of duty which in the aggregate exceed" 171 hours. See *id.* The City and the Fraternal Order of Police ("FOP"), the exclusive bargaining representative of Chicago police officers, have entered into a collective bargaining agreement that provides for more generous overtime pay than the FLSA requires, see Pet. App. at A-6; it provides that police officers will be paid overtime at the rate of time-and-one-half for all hours worked in excess of eight hours in a day or 40 hours in a week. See Pet. App. at A-5. Police officers work an eight and one-half hour tour of duty with a one-half hour unpaid meal period. See *id.* at A-2. The collective bargaining agreement also sets forth a grievance procedure for disputes between the parties, providing for arbitration before a neutral party agreeable to both sides if a grievance is not resolved at an earlier stage. See *id.* at A-5.

Petitioners here claimed that their meal periods are working time because they must receive permission from a dispatcher before they take a meal break; during the break uniformed officers must remain in uniform and in their assigned districts; officers must be available by radio to the dispatcher; officers in two-person units must take their break at the same time; no more than two officers may congregate at a meal break without prior permission; and officers must respond to civilian inquiries or requests for assistance and maintain departmental courtesy. See Pet. App. at A-3 to A-4. In 1992, the district court granted the City judgment on the pleadings. See Pet. App. at D-1 to D-14. The first appeal of this case to the Seventh Circuit followed. In that appeal, two of the three members of the panel rejected petitioners' claim that the restrictions placed on them during their meal period were sufficient, in and of themselves, to make their meal period work time. See *Alexander v. City of Chicago,* 994 F.2d 333, 341 (7th Cir.

1993) (Crabb, J., concurring); *id.* at 344-45 (Bauer, C.J., dissenting). The fractured panel nevertheless reversed the district court's judgment and remanded the case to the district court because two members concluded that the frequency of interruptions could convert meal periods to working time. See *id.* at 340-41.

The City also argued that the collective bargaining agreement resolved the FLSA question, although we noted that this issue had not been before the district court and no record had been developed on matters pertaining to it. In a footnote in his opinion, Judge Cudahy stated that the collective bargaining agreement was only one factor that a factfinder should consider when determining whether police officers were relieved from duty at meal time. See *id.* at 339 n.11. In her concurrence, Judge Crabb decided that she could properly consider only the pleadings, and did not address the effect of the collective bargaining agreement on the petitioners' claim at all. See *id.* at 340-42. In dissent, Chief Judge Bauer expressed the view that the collective bargaining agreement comported with the FLSA and hence provided the City with a defense to liability. See *id.* at 344-45.

Discovery on remand showed that there were officers who had been paid overtime for working during a missed meal period. Leahy Rec., Pl. Ex. Vol. 4, Ex. L; *id.* Vol. 5, Ex. M.[1] The record also showed that some officers were not paid and had filed grievances regarding meal periods. Some grievants prevailed and were paid overtime for meal periods in which they worked; one was paid for his meal period, but not at overtime rates because he had not worked more than eight hours during the tour of duty in question; while other grievances were denied.

---

[1] Four cases were consolidated in this appeal. The documents filed on summary judgment all appear in the record in *Leahy v. City of Chicago*, No. 95-2015.

Leahy Rec. 190, Kimber Aff. Exs. A-F. For example, two officers were denied overtime pay for a meal period because their watch commander had seen them take a full meal period while they claimed they were taking a personal break. *Id.* at Ex. B. In all, petitioners filed more than 200 affidavits of police officers, many of which stated that the officer had not requested pay for missed or interrupted meal periods. Although many of the affidavits made the conclusory allegation that requests for pay were discouraged by supervisory personnel, not a single officer who filed an affidavit identified a specific occasion on which he or she was discouraged from requesting pay, nor did any identify any supervisory personnel who allegedly discouraged officers from requesting pay for missed or interrupted meal periods. See Pl. Ex. Vol. 1-3. Moreover, none of the affidavits identified a single specific occasion on which the affiant worked during a meal period, ultimately worked more than eight hours during a tour of duty, requested pay for the missed or interrupted meal period, and was denied pay on the ground that overtime is not available for missed or interrupted meal periods. See *ibid.*

On this record, the City filed a motion for summary judgment, raising, among other issues, that the collective bargaining agreement protected the officers' FLSA rights. All parties agreed that discovery on the issues raised in the motion for summary judgment was complete. See Pet. App. at A-4. In March 1995, the district court issued a memorandum opinion and order granting summary judgment in favor of the City, but rejecting both of the grounds in the City's motion. See Pet. App. at B-1 to B-20. The district court granted the City summary judgment on the ground that the restrictions on officers and the interruptions did not make officers' meal periods compensable work time under the FLSA. See *id.* at B-20. Petitioners appealed. On appeal, the City agreed with

the petitioners that discovery was not yet complete on the question of the frequency and duration of interruptions, but all parties acknowledged that discovery was complete on the issues raised by the City's motion for summary judgment which included the collective bargaining agreement. See *id.* at A-4.

The Seventh Circuit held that the City was entitled to summary judgment on the basis of the collective bargaining agreement. See Pet. App. at A-7. The majority concluded that under the collective bargaining agreement, the City will pay overtime to an officer who works more than eight hours in a day as a result of working during a meal period. See *id.* at A-6. Noting that the petitioners claimed that the City must pay all police officers for all meal periods without individual resolution of the question whether an officer has worked during his or her meal period, the court found such a rule would require the City to pay overtime to officers "for doing nothing more than eating during their meal periods." *Id.* at A-7. The court held that in a police department of more than 12,000 officers working different shifts in different districts throughout the City, the grievance procedure set forth in the collective bargaining agreement provides the most efficient method to resolve whether an individual officer's meal period constituted compensable work time. *Id.* at A-6 to A-7. Judge Cudahy dissented. See *id.* at A-7 to A-13.

ARGUMENT

Petitioners seek review of this case on the basis that the decision of the Seventh Circuit conflicts with this Court's decision in *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), and with the Tenth Circuit's decision in *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992), cert. denied, 507 U.S. 972 (1993). The decision below, however, conflicts with neither. The decision in this case turned upon the details of the record that was before the district court on summary

judgment. That record demonstrated that petitioners are in fact compensated when they work during a meal period. That is all the FLSA requires.

In particular, the record here shows that the collective bargaining agreement requires the City to pay overtime to officers who work more than eight hours in a tour of duty; that the City had not refused to pay overtime to officers who had worked during a meal period; that it had paid overtime to some officers who had worked during their meal periods; that for perfectly legitimate reasons it had denied pay to some officers who claimed to have worked during their meal periods; and that many petitioners themselves acknowledged that they did not request pay for missed or interrupted meal periods. Although petitioners claim that the "threshold factual issue" whether they are denied compensation for working time has not yet been addressed by the Seventh Circuit (see Pet. 9), in fact not a single affidavit in this record has identified any specific occasion on which a police officer had worked during a meal period, ultimately worked more than eight hours during a tour of duty, requested overtime pay for the meal period, and was denied pay. It is well established that a party opposing summary judgment must come forth with "specific facts" demonstrating an issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In light of the record that was before the district court on summary judgment, showing that the City had not refused to comply with the requirement in the collective bargaining agreement of paying overtime to officers who worked more than eight hours in their tour of duty, the majority correctly decided that the collective bargaining agreement protects the FLSA rights of the officers. That decision raises no issue that merits this Court's review.

1. The decision in this case does not conflict with this Court's decision in *Barrentine*. There, this Court held that an arbitrator's decision that certain time was not com-

pensable under a collective bargaining agreement did not bar the plaintiffs from bringing a suit for violation of the FLSA. In the present case, there was no holding that any arbitrator's decision barred this suit. Instead, the Seventh Circuit held that the collective bargaining agreement protects petitioners' right to be compensated for working time. This was, of course, a decision by a federal court, not an arbitrator. Nothing in *Barrentine* requires a full trial of all circumstances surrounding meal periods to determine whether they are compensable time. Nor does *Barrentine* alter the rule that collective bargaining agreements may themselves sufficiently protect employees' FLSA rights to afford employers a defense to FLSA liability. See *Tennessee Coal, Iron & Railway Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

Petitioners also claim that a court must determine that the circumstances surrounding meal periods make the time non-compensable time under the FLSA before the provisions of the collective bargaining agreement can come into play. That claim is not correct. Since *Tennessee Coal* it has been clear that the parties may resolve by contract the computation of work hours "where precisely accurate computation is difficult or impossible." 321 U.S. at 603. And, in any event, the question whether the meal periods of officers of the Chicago Police Department are worktime for FLSA purposes by virtue of the restrictions on police officers during meal periods was decided in the first appeal in this case. That decision established that the restrictions placed upon officers during their meal periods—for example, the requirements that uniformed officers remain in uniform during their meal period, that they inform the dispatcher where they are, and that they take their meal within the district to which they are assigned—did not raise an issue of fact about whether meal periods in general amounted to working time for which all officers must be paid. All three members of the panel agreed that if officers are to be paid for their meal periods

on that theory, they would need to show that they spend meal periods predominantly or primarily for the benefit of the employer. See *Alexander v. City of Chicago*, 994 F.2d at 337 (Cudahy, J.); *id.* at 341 (Crabb, J., concurring); *id.* at 345 (Bauer, C.J., dissenting). A majority of that panel went further, and held that the restrictions imposed on Chicago police officers during meal periods did not in themselves convert meal periods to working time. Judge Crabb wrote:

> To the extent that [Judge Cudahy's] opinion can be read to hold that the officers have raised a triable issue of fact merely by proffering the actual departmental regulations, I disagree with it. The regulations do not affirmatively require the performance of active duties or so restrict the officer's choice of location and activities to make his lunch break the equivalent of work time.

994 F.2d at 341 (concurring opinion). Chief Judge Bauer agreed with Judge Crabb. *Id.* at 342 (dissenting opinion). The point of divergence between the concurrence and the dissent was solely whether the frequency of interruptions could change this. Judge Crabb concurred in the result because she agreed with Judge Cudahy that frequent interruptions during meals could convert meal periods into working time, see *id.* at 341 (Crabb, J., concurring); see also *id.* at 340 (Cudahy, J.), while Chief Judge Bauer concluded that they could not, see *id.* at 345.

Thus, the first appeal in this case established that officers need be paid under the FLSA only when their meal periods were actually interrupted and their meals became time spent "predominately on their employer's business." *Id.* at 341 (Crabb, J., concurring). This ruling is completely consistent with *Barrentine*. Nowhere did the first panel suggest that it should defer to the arbitral process in determining whether meal periods are working time. That decision established that meal times are not work time unless the officer is interrupted.

In the second appeal, the majority concluded that the collective bargaining agreement contained " 'reasonable provisions of contract [to guide] the computation of work hours where precisely accurate computation is difficult or impossible.' " Pet. App. at A-5 (quoting *Tennessee Coal*, 321 U.S. at 603). That ruling is also consistent with *Barrentine*. The panel did not hold that the collective bargaining agreement foreclosed this suit, but that it contained a reasonable means of protecting officers' statutory rights when they actually do work during a meal period. Thus, the court did not defer to the arbitral process but answered the question itself, based on the collective bargaining agreement. As we explain above, that determination was correct. The record showed that under the collective bargaining agreement, the City agreed to pay overtime to officers who claim that they have worked during their meal period and can satisfy the City or an arbitrator that they have in fact worked. And the majority of the panel very reasonably concluded that any factual dispute as to whether any specific officer had actually missed or had a meal period interrupted should be left to the grievance and arbitration procedure, rather than to a trial in the district court on more than 7,600 individual claims.

For the same reasons, nothing in the panel's holding conflicts with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Petitioners claim that *Skidmore* requires the court to scrutinize all the circumstances surrounding the time at issue to determine whether it is compensable working time. The Seventh Circuit did just that in the first appeal. Moreover, *Skidmore* plainly supports the holding in the second appeal in this case. In *Skidmore*, the Court stated that the test for whether time is compensable working time "involves scrutiny and construction of the agreements between the particular parties, [and] appraisal of their practical construction of the working agreement . . . ." *Id.* at 137. The Court also explained that "[t]he law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement

was." *Ibid.* Here, the agreement between the parties was that the City would pay overtime for all time worked in excess of eight hours in a tour of duty, and the record before the district court on summary judgment demonstrated that the City had not refused to comply with the collective bargaining agreement when an officer had to work during a meal period. The majority's consideration of the collective bargaining agreement in this case was in perfect accord with this Court's decision in *Skidmore*.

Moreover, the decision in *Barrentine* does not stand in a vacuum. In *Barrentine*, this Court did not overrule or repudiate in any way the decision in *Tennessee Coal*. As we note above, in *Tennessee Coal*, the Court stated that parties could resolve "by reasonable provisions of contract . . . the computation of work hours where precisely accurate computation is difficult or impossible," as well as "borderline cases where the other facts give rise to serious doubts as to whether certain activity constitutes work or employment." 321 U.S. at 603. Once the first appeal in this case established that meal periods are not inherently work time based on the restrictions placed on officers, this became just such a case. Here, as the Seventh Circuit noted, see Pet. App. at A-6 to A-7, there are more than 12,000 police officers working on different shifts in different districts of one of the largest cities in the nation. They take their meals in their districts, where they may or may not be interrupted by emergencies or citizens requesting police services. If they are interrupted, they may extend their meal period to make up for the time of the interruption. See, *e.g.*, Leahy Rec., Pl. Ex. Vol. 4, Ex. K at 36; Pl. Ex. Vol. 5, Ex. M at 50-52; Pl. Ex. Vol. 5, Ex. N at 92-95. Whether an individual officer is actually called upon to work during a meal period can vary from district to district, from day to day, or even from restaurant to restaurant within a district. In fact, the hundreds of affidavits from petitioners indicate that most of them pass their meal periods completely uninterrupted about

60% to 70% of the time. See Leahy Rec., Pl. Ex. Vol. 1-2, Group Ex. A.

Certainly, as the majority concluded, see Pet. App. at A-7, nothing in the FLSA requires an employer to pay an employee for time during which the employee is not working. Under the test adopted by the Tenth Circuit in *Lamon v. City of Shawnee*, 972 F.2d 1145, 1155-57 (10th Cir. 1992), cert. denied, 507 U.S. 972 (1993), and by the Seventh Circuit in this case, see Pet. App. at A-3 n.2, that is not compensable time because it is not time spent predominantly for the benefit of the employer. The collective bargaining agreement assures officers that if they actually work more than eight hours, they will be paid. And there is no claim that any arbitrator has failed to honor this assurance.

Barrentine presented quite a different question. In that case, the issue was a straightforward question whether time that the employer required truck drivers to spend conducting truck safety inspections constituted compensable working time. See 450 U.S. at 730. An arbitration panel decided that it did not. *Id.* at 731. But here the court has not deferred to an arbitration decision holding that meal periods are not work time. And here the question is far from simple, and presents the type of difficult and complicated situation that this Court concluded could be resolved by a reasonable collective bargaining agreement. See *Tennessee Coal*, 321 U.S. at 603. As we note above, whether any one of the 12,000 Chicago police officers working different shifts in different districts has been called upon to work during a meal period will vary from day to day, shift to shift, and district to district. Even for an individual officer, there will be day-to-day variations in whether or not a meal period is interrupted by work. The panel majority quite correctly held that the City does not violate the FLSA when it has agreed in a collective bargaining agreement to pay overtime to employees who do work during their meal period and when all disputes about whether an individual employee has

worked can be resolved by grievance and arbitration proceedings.[2]

Moreover, in *Barrentine*, this Court emphasized that FLSA rights are individual rights, not collective rights. See 450 U.S. at 745. Here, it is the petitioners who seek a collective solution to this case. Their submission amounts to the claim that because some of the officers are interrupted during some of their meal periods, the City must pay all of the officers for all of their meal periods. The FLSA, however, requires individual resolution of the question whether an officer has worked during a meal period. The grievance resolution procedures of the collective bargaining agreement provide just that individual resolution. As the majority noted, the FLSA does not require the City to pay officers who do nothing more than eat during their meal period. See Pet. App. at A-7. That conclusion is eminently correct.

2. The decision in this case also does not conflict with the decision of the Tenth Circuit in *Lamon*. The decision in *Lamon* did not address the effect of a collective bargaining agreement on the employer's FLSA obligations. The cross appeals in *Lamon* presented eleven issues that the court listed in a footnote, but none involved a collective bargaining agreement. See 972 F.2d at 1148 n.4. The opinion of the court makes no mention of a collective

---

[2] Petitioners argue that the record contains no evidence that the City and the FOP considered the FLSA and its effect on meal periods when negotiating the collective bargaining agreement. Pet. at 8. But the panel's holding is not based on explicit consideration of the FLSA or an explicit agreement that meal periods constitute working or non-working time under the FLSA. Instead, as we explain above, the holding is based on the City's agreement to pay overtime for all hours in excess of eight hours in a tour of duty, the evidence in the record showing that the City did pay overtime to officers who had worked during their meal period, and the existence of a grievance and arbitration procedure to resolve disputes about whether an individual officer has worked during a meal period.

bargaining agreement, and nowhere considers or discusses the effect of a collective bargaining agreement on the issues in the case. The *Lamon* court did not hold, as petitioners suggest, that a collective bargaining agreement is not applicable to the question whether meal periods are compensable work time. Indeed, the decision of the Tenth Circuit gives no indication whether the employment of the fifteen police officers in that case was even covered by a collective bargaining agreement. This case and *Lamon* concern different legal and factual issues, and, therefore, there is no conflict between the two decisions.

Nor does the Seventh Circuit's decision in this case conflict with the holding in *Lamon* that the test for whether meal periods are compensable work time is whether the time is spent predominantly for the benefit of the employer. See 972 F.2d at 1157. The Seventh Circuit uses the same test as *Lamon,* as the majority acknowledged in the decision in this case. See Pet. App. at A-2 to A-3 n.2 ("[W]e and other circuits have adopted the 'predominant benefit' test for determining whether meal periods constitute compensable work time under the FLSA."). Here, the panel merely decided that time spent doing nothing other than eating a meal was not time spent predominantly for the benefit of the employer. See *ibid.*; see also *id.* at A-7. That conclusion does not conflict with *Lamon.*

Petitioners also suggest that the majority in this case held that the mere existence of a general overtime provision in a collective bargaining agreement foreclosed any FLSA claim. Pet. at 11. But that is not correct. The majority's decision in this case was based upon the detailed factual record before it, which as we explain above, showed that the City had not refused to pay officers who worked during their meal periods, and was devoid of any evidence of even a single specific incident in which an officer missed or was interrupted during a meal period, ultimately worked more than eight hours in a tour of duty, requested pay for the meal period, and

was denied pay. In these circumstances, the majority correctly concluded that the City had not violated the FLSA.

3. This case does not present an important question meriting this Court's review. It does not present a pure question of law, as petitioners claim. See Pet. 12. Instead, the resolution of this case turned upon the unique facts of record. One factor in this case was the inadequacy of the conclusory, form affidavits filed by the petitioners in response to the City's motion for summary judgment. Petitioners failed to comply with Fed. R. Civ. P. 56(e), which requires a party opposing summary judgment to come forth with specific facts demonstrating an issue for trial. See *Celotex Corp. v. Catrett,* 477 U.S. at 324. This case also involved a police department of more than 12,000 sworn officers working different shifts around-the-clock, in different districts of one of the largest cities in this nation, thus presenting myriad different circumstances that might or might not result in missed or interrupted meal periods. It presented a complicated set of facts absent from police meal period cases such as *Lamon* involving much smaller police departments in smaller municipalities. As we note above, this case involved exactly the type of difficult FLSA questions that the parties can resolve "by reasonable provisions of contract." See *Tennessee Coal,* 321 U.S. at 603.

4. The majority decision in this case does not ignore the doctrine of law of the case. That doctrine applies only to prior holdings of a court. See *Arizona v. California,* 460 U.S. 605, 618 n.8 (1983). The first decision in this case did not hold that the collective bargaining agreement could not be the basis for a defense to petitioners' claim. That appeal arose after the district court granted judgment on the pleadings. See *Alexander,* 994 F.2d at 334. The City raised the collective bargaining agreement on appeal as an alternative legal basis for affirmance, although it had not been before the district

court and no record had been developed on matters pertaining to it. In a footnote, Judge Cudahy stated that the collective bargaining agreement was only one factor that a factfinder should consider when determinnig whether police officers were relieved from duty at meal time. See *id.* at 339 n.11. This view, however, was the opinion of only one judge on the panel. Judge Crabb decided in her concurring opinion that she could properly consider only the pleadings and did not address the effect of the collective bargaining agreement at all. See *id.* at 340-42. And Chief Judge Bauer in dissent explained that he would find that the collective bargaining agreement did satisfy the FLSA. See *id.* at 345. Because there was no holding that the collective bargaining agreement could not be a defense to petitioners' claim, there was no law of the case on this issue. At most, the majority below rejected a footnote expressing the view of a single member of the panel on the first appeal.

Moreover, as the majority noted in its decision in this case, there was good reason for departing from the view expressed in the footnote in the prior decision. During the first appeal, the case was before the court on the pleadings only. When this case was remanded to the district court, discovery proceeded on the issues on which the City moved for summary judgment. When it returned to the Seventh Circuit, the record on the collective bargaining agreement and its effect on overtime pay for meal periods had been greatly developed. Thus, the majority recognized that the decision in the first appeal "was based on a less developed record than we have here . . . ." Pet. App. at A-6. The more fully developed record constituted sufficient reason to depart from the suggestion in the footnote in the first appeal. And, finally, this Court has noted that the doctrine of the law of the case does not prevent a court from departing even from a prior holding if it is convinced that the prior holding was erroneous and would work a manifest injustice. See *Arizona v. California*, 460

U.S. at 618 n.8. Departure from a mere suggestion in a footnote in a single judge's opinion does not merit this Court's review.

In sum, the decision below does not conflict with prior decisions of this Court or with the decision of the Tenth Circuit in *Lamon*. It is based upon the particular factual record before the district court and neither presents an important question of law nor ignores the law of the case. The decision on the merits is correct and there is no reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
MARDELL NEREIM *
Assistant Corporation
Counsel
30 North LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-6975
Attorneys for Respondent

April 15, 1997

* Counsel of Record